



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

OFFICE OF  
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DELAWARE-MARYLAND ASSISTANT DISTRICT COUNSEL  
CC:SER:DEM:WAS  
Attn:

FROM: Assistant Chief Counsel (Administrative Provisions & Judicial  
Practice) CC:PA:APJP

SUBJECT: Joint Return After Filing Separate Return

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## LEGEND

Taxpayer =  
Year 1 =

## ISSUES

(1) Whether Taxpayer, who previously filed a Year 1 return claiming head of household filing status, may file a Year 1 return with his spouse electing joint filing status after the Taxpayer has filed a timely petition with the Tax Court with respect to a notice of deficiency issued for Year 1.

(2) Whether the Commissioner is bound by erroneous advice given by a revenue agent regarding Taxpayer's ability to elect to joint filing status.

## CONCLUSIONS

(1) Section 6013(b)(2) prevents Taxpayer and his spouse from electing a joint filing status.

(2) If the revenue agent gave Taxpayer erroneous advice regarding entitlement to joint filing status, the Commissioner is not bound by the erroneous advice.

## FACTS

For Year 1, the tax year in issue, taxpayer filed his Federal income tax return claiming head of household filing status. Later, the Commissioner issued a notice of deficiency to Taxpayer for Year 1 determining, among other things, that Taxpayer's was not entitled to head of household status and that Taxpayer's proper filing status was married filing separately. Taxpayer filed a timely petition with the Tax Court claiming, among other things, that the Commissioner's adjustment to his filing status was improper.

During the course of settlement negotiations, Taxpayer admitted that he is not entitled to head of household filing status. However, Taxpayer now contends that he and his wife should be allowed to file a joint Federal income tax return because his proper filing status for Year 1 is "married, filing jointly." Taxpayer further contends that he should be allowed to file a joint Federal income tax return because the Commissioner's revenue agent advised him that this would be permissible and he relied on the advice.

## LAW AND ANALYSIS

### Issue 1

Section 6013(a) of the Internal Revenue Code provides generally that a husband and wife may make a single return jointly of income taxes. However, where a prior separate return has been filed, the election of joint filing status is subject to the requirements of section 6013(b).

Section 6013(b)(1) provides that if an individual has filed a separate return for a taxable year for which a joint return could have been made, the individual and his spouse may file a joint return even if the time prescribed for filing for such taxable year has expired. Section 6013(b)(2) provides four limitations to this joint return election. One limitation, under section 6013(b)(2)(B), is that the election may not be made after there has been mailed to either spouse as to the tax year involved a notice of deficiency, if the spouse, as to such notice, files a petition with the Tax Court within the time prescribed in section 6213. Another limitation, under section 6013(b)(2)(A), is that joint filing status cannot be elected after the expiration of 3 years from the last date prescribed by law for filing the return for the taxable year (determined without regard to any extension of time granted to either spouse).

The Tax Court has strictly applied the limitation in section 6013(b)(2)(B), which was explained in Currie v. Commissioner, T.C. Memo. 1986-71, as follows:

Under the clear language of the statute, the right of each petitioner to elect to file a joint return after having first filed separate returns was terminated after respondent mailed a notice of deficiency to a spouse and that spouse timely filed a petition with the Tax Court with respect to the taxable year in issue. Section 6013(b)(2)(C);<sup>1</sup> Druker v. Commissioner, 77 T.C. 867, 873 (1981), affd. on this issue 697 F.2d 46 (2d Cir. 1982). The statutory language is clear and unambiguous. This Court has no authority to expand the explicit terminology of the statute. Donigan v. Commissioner, 68 T.C. 632 (1977). We must apply the law as written.

In Glaze v. United States, 641 F.2d 339 (5<sup>th</sup> Cir. 1981), the executor of one spouse's estate and the surviving spouse claimed a refund based on an amended joint return after a state court determined the parties had met the requirements for a

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<sup>1</sup> Section 6013(b)(2)(C) is the predecessor to section 6013(b)(2)(B).

valid common-law marriage. The joint return was filed within 3 years of the filing of the return for which tax was paid, but more than 3 years after the due date, contrary to section 6013(b)(2)(A). However, the court reasoned that, because section 6013(b)(1) referred to an individual who had “filed a separate return,” the restrictive rule in section 6013(b)(2) applied only to taxpayers who filed as married filing separately under section 1(d) and not to taxpayers who had filed as unmarried. Thus, the taxpayers, who had both shown an unmarried filing status on their original returns, were not barred under the predecessor of section 6013(b)(2)(A) from electing to file a joint return more than 3 years after the original due date for filing the joint return.

The Service announced in Rev. Rul. 83-183, 1983-2 C.B. 220, that it would not follow Glaze. In Rev. Rul. 83-183, the Service concluded that the reference to prior separate returns in section 6013(b) should be viewed as a reference to the filing of any non-joint return under sections 1(b) (head of household), 1(c) (unmarried), or 1(d) (married filing separately). This view is supported by Saniewiski v. Commissioner, T.C. Memo. 1979-337, which holds that an individual who had originally filed as unmarried is barred from filing a joint return after that individual filed a petition with the Tax Court. Similarly, Blumenthal v. Commissioner, T.C. Memo. 1983-737, holds that an individual who filed as a head of household could not later file a joint return after filing a petition with the Tax Court. See also Phillips v. Commissioner, 86 T.C. 433, 440 (1986), aff'd in part and rev'd in part on another issue, 851 F.2d 1492 (D.C. Cir. 1988), in which the Tax Court stated that in Glaze the Fifth Circuit’s reading of “separate return” in section 6013(b) was too narrow.

In this case, Taxpayer filed a return claiming head of household status. Taxpayer cannot later obtain joint filing status with his spouse after receiving, with respect to the earlier return, a notice of deficiency as to which Taxpayer filed a timely petition with the Tax Court. Section 6013(b)(2)(B) specifically bars the filing of a joint return in this situation. The prohibition against filing the joint return is applicable whether the filing status for the earlier return was married filing separate, head of household, or unmarried. Rev. Rul. 83-183, 1983-2 C.B. 220, supra.

## Issue 2

It is well settled that the Commissioner is not bound by the erroneous advice of his agents, especially when the advice is contrary to statute. Dixon v. United States, 381 U.S. 68 (1965). Furthermore, with respect the filing of a joint return, the Tax Court has held that under no circumstances may a revenue agent waive the statutory conditions under which an effective joint return can be filed. Kirby v. Commissioner, 35 T.C. 306 (1960). See also Mazanek v. Commissioner, T.C.

Memo. 1984-633 (Internal Revenue Service not bound by erroneous instructions concerning the filing of a joint return).

In the instant case, even if the revenue agent gave Taxpayer erroneous advice regarding entitlement to joint filing status, the Commissioner is not bound by the erroneous advice. Therefore, Taxpayer and his spouse are not entitled to joint filing status for the tax year in issue.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

There are no significant litigating hazards with respect to the issues addressed if the case is not appealable to the Fifth Circuit. However, if the case were appealable to the Fifth Circuit, Glaze would present a litigating hazard in light of the Fifth Circuit's opinion in Glaze that the restrictive rule of section 6013(b)(2) applies only to taxpayers who filed as married filing separately under section 1(d).

Please call Willie E. Armstrong, Jr. at (202) 622-7920 if you have any further questions.

CURTIS G. WILSON

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